NAVIGATING NON-COMPETE CLAUSES: INDIA'S FRAMEWORK AND A CROSS-JURISDICTIONAL ENFORCEABILITY ANALYSIS

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ABSTRACT

This paper examines the trajectory of non-compete clauses (NCCs) in India, from the initial restriction of trade prohibition in Section 27 of the Indian Contract Act from the colonial era, to post-independence restrictive interpretations, and more recently, modern judicial relaxation in the interpretation of in-term restrictions. The study also closely examines the current legal regime allowing for reasonable in-term restraints on employment to protect trade secrets and customer relationships, whilst invalidating generally post-employment restraints except on limited grounds concerning goodwill, or sale-of-business. The article also examines the effects of economic liberalization, the rise of multinational employers, the gig economy, and start-up culture, but at the same time grapples with the challenges posed by remote work and the upheaval of workforce planning arising from the pandemic situation. It provides comparative perspectives from other jurisdictions with different approaches - either flexible, reasonableness-based on NCCs, or a codified statutory approach with mandatory compensation. The article concludes with a series of recommendations for India's approach to NCCs: codifying time limits along with geographic limits for enforceable NCCs, making any compensation subject to reasonableness/ proportionality, encouraging the exploration of just using other kinds of covenants (NDAs, non-solicitations), and establishing reporting mechanisms so that codified practice can balance employer rights with labour mobility and innovation.

Keywords: Non-compete clauses, Indian Contract Act, Labor mobility, Alternative covenant.

INTRODUCTION

Non-compete agreements, also referred to as covenants not to compete, have become commonplace in employment agreements across industries as tools to protect trade secrets, customer contacts, and firm-specific human capital. Rooted in common-law doctrines against restraints of trade, contemporary non-compete agreements typically restrict departing employees in terms of time, geography, and activities, and often last for a few months or years after termination1. While employers claim they are a necessary means to protect the costs of training and innovation, empirical research shows that they are very costly in that they hinder labor mobility, lower wages, and impede entrepreneurs from entering the workforce. For example, Starr, Prescott, and Bishara (2021), estimate that about 18 percent of U.S. workers are covered by non-competes, and show that even unenforceable covenants, dissuade employees from taking competing job offers[1]Non-compete and non-poaching provisions are seen as significant legal restrictions on job mobility by OECD Employment Outlook 2021 recommends reforms aimed to support worker mobility and reduce wage inequality[2]. Across the globe, responses from policymakers vary widely—from California's near-total ban of employee non-competes to India's ban under section 27 of the Indian Contract Act, 1872—reflecting different policy priorities between free labor market operations and protecting legitimate business interests. Recent changes in labor markets as a result of COVID-19 have increased scrutiny of non-competes, with some initiatives, such as the U.S. Federal Trade Commission's 2023 proposal to ban the majority of non-compete agreements, since they disproportionately burden low-wage and remote workers[3].

In this paper, we focused on critically reviewing India's legal treatment of non-competes from their colonial origins to the post-independence jurisprudence (exemplified by Golikari) as well as current issues surrounding non-competes in the gig and knowledge economy sectors. We incorporated doctrinal analysis, comparative analysis within both common-law (U.S.) and civil-law (Germany, France) frameworks, as well as consideration of alternatives (non-disclosure, non-solicitation, and garden-leave) to present policy recommendations that

[1] Evan P Starr, Noncompete Agreements in the U.S. Labor Force, (Oct. 5, 2021), https://repository.law.umich.edu/articles/2263/ (last visited Mar 25, 2025)

[2] OECD (2021), *Non-Compete Clauses in Germany: Trends and Challengeshttps://www.oecd.org/en/publications/2021/05/oecd-economic-outlook-volume-2021-issue-1_88e062cf.html* (last visited Mar 26,2025)

[3] Francis R, "Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence" (*Economic Innovation Group*, October 31, 2023) https://eig.org/noncompetes-research-brief/ accessed April 20, 2025

would seek to balance the competing interests of protecting firm-level innovations with labour-market flexibility.

1. INDIA'S LEGAL FRAMEWORK GOVERNING NON-COMPETE CLAUSES

1.1 Origin

The legal framework of non-compete clauses in India has evolved and been influenced by colonial laws, economic policies, and various judicial interpretations. As far as the origin of the non-compete clause is concerned, it is safe to say that in India is rooted in the common law of England, stemming from British rule. Initially, under English law, contracts that restricted trade were considered void (primarily because of their inherently restrictive nature). However, as time progressed, English courts began to uphold non-compete clauses if they were assessed as "reasonable" in terms of scope, duration, and geography. These principles were formalized in Section 27 of the Indian Contract Act, of 1872, which explicitly prohibited agreements that restrained trade, unlike the English common law, which permitted reasonable restrictions. However, this section 27 originates from the **Field's Draft Code for New York**, which was never adopted in New York.[4] The present Indian Contract Act reads: "Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is, to that extent, void."[5] Nonetheless, an exception was made for agreements concerning the sale of goodwill. If a seller consented to refrain from engaging in a similar business within reasonable limits, the non-compete clause could be enforced. This exception reflects an understanding that in certain business transactions, such restrictions might be necessary because they serve to protect legitimate business interests.

1.2 Non-Compete Clauses in the Post-Independence Era

Following India's independence in 1947, courts adopted a strict construction of Section 27, thereby reinforcing the constitutional guarantee of the right to practice any profession or trade as provided under Article 19(1)(g). In Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd[6]., A distinction was drawn by the Supreme Court between restraints

[4] Harish Nambiar, Non-Compete Provisions under the Indian Contract Act and Its Applicability: An Analysis, 14 INT'l. IN-HOUSE COUNSEL J. 1 (Summer 2021).
[5] The Indian Contract Act, 1872 § 27 (1872).
[6] 1967 AIR 1098

during employment, which were permissible, and post-employment restraints, which were rendered void. The court upheld confidentiality agreements and restrictions meant to protect trade secrets but ruled that post-employment non-compete clauses violated Section 27 except under the exception in respect of goodwill. This ruling set a precedent that continues to influence Indian jurisprudence in matters relating to the non-compete clauses.

1.3 The Influence of Economic Liberalization

After the liberalization of the Indian economy in 1991, numerous multinational corporations (MNCs) infiltrated the Indian market, introducing international employment practices, which included non-compete agreements. Knowledge-driven sectors such as IT, pharmaceuticals, and finance became increasingly dependent on these clauses to mitigate the potential misuse of confidential information and client data. Yet, the expansive business environment could not change the intervention of Indian courts in this regard the Supreme Court affirming in Gujarat Bottling Co. Ltd. v. Coca-Cola Co.[7] that negative covenants during the subsistence of a contract were enforceable, but post-termination non-compete clauses would generally remain void unless caught by statutory exceptions. Courts continued to favor economic liberty and job mobility, to the exclusion of undue restrictions on employees from seeking new opportunities.

1.4 Present-day structure of non-compete clauses in India

The enforceability of non-compete clauses in India is primarily governed by **Section 27 of the Indian Contract Act, of 1872**, which declares void any agreement that restrains a person from exercising a lawful profession, trade, or business. This provision reflects India's public policy favoring free trade and competition. However, the law carves out an exception for restraints imposed *during* the term of employment, provided they are reasonable and necessary to protect the employer's legitimate business interests, such as trade secrets, confidential information, or customer relationships. Post-employment non-compete clauses, on the other hand, are generally unenforceable unless they are ancillary to the sale of a business or goodwill. Judicial precedents, such as *Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd*[8]. and *Wipro Ltd. v. Beckman Coulter International S.A.*[9], have reinforced this distinction. In addition to the Indian Contract Act other statutes also exert influence over the enforceability of

[7] 1995 AIR 2372
[8] Supra note 6
[9] 2006(3)ARBLR118(DELHI)

non-compete clauses such as Under the Partnership Act, of 1932, Section 11 helps in concluding non-compete restraints among partners during the partnership term, while Section 36 allows for the imposition of reasonable restraints on outgoing partners to prevent unfair competition. Similarly, the Companies Act, 2013, acknowledges restrictive covenants in the case of mergers, acquisitions, and employment contracts; however, such restrictions still remain subject to scrutiny under Section 27 of the Contract Act.

2. CONTEMPORARY DEVELOPMENTS & ALTERNATIVE MECHANISMS IN INDIA

In recent years, technological advancements such as the emergence of startups and the growing gig economy have intensified debates surrounding non-compete clauses. Businesses assert that such clauses are crucial to prevent unfair competition and safeguard proprietary information; however, employees and legal experts argue that these provisions restrict job mobility and stifle innovation. However, Indian courts showed flexibility by enforcing confidentiality agreements and non-solicitation clauses, while on the other hand, they have also shown reluctance towards enforcing any post-employment non-compete agreement. As globalization progresses and digital industries keep evolving, it may become imperative for the laws that govern non-compete clauses in India to be accustomed further to align business interests with individual freedoms

2.1 The Impact of the COVID-19 Pandemic on Non-Compete Clauses

The COVID-19 pandemic occupied the most significant place and shifted the equilibrium within the employment arena regarding the understanding and operationalization of non-compete clauses, as a tool employed through the ages to protect trade secrets, relationships with customers, or the proprietary matters of an employer. Unfortunately, intense scrutiny on such restrictive covenants came to be because of the severe layoffs and economic disruptions that became major tragedies due to COVID-19, as courts had begun weighing the negative impact on the livelihood of employees against the need for protection by employers. There used to be a wide application of non-compete agreements, provided that they were limited in protecting legitimate business interests. Still, because of COVID-19, the balance shifted. The courts are starting to weigh the question of whether enforcement of these clauses would impose excessive hardships on the workers when some of them do secure such job opportunities. Some others refuse to issue injunctions against laid-off employees, arguing that it should be in the

public interest to allow workers to earn a living as opposed to protecting the employer.[10] Remote work has added another layer of complexity to this issue. Traditionally, non-compete agreements often spelled out geographic limitations that were designed to restrict competition within a certain geographic region. The quick transition into telecommuting amid the pandemic has made these geographic constraints quite troublesome. With the lines between physical workspaces and home offices being blurred, calls have arisen to reassess what constitutes a "reasonable" geographic scope; some experts assert these restrictions may no longer be defensible in a principally remote work environment[11]Thus COVID-19 pandemic has, nonetheless, served to fast-track a rethinking of non-compete contracts that articulate the necessity of a proper equilibrium to be struck between protecting legitimate business interests and upholding employees' rights to earn a living. With remote working establishing more roots and the economy in recovery, conditions applied with greater equilibrium within judicial norms and legislative contrivances ought to entail stiffer action against non-competes to the extent that fair play is maintained and competition thrives in the labor market.[12]

2.2 The Role of Startups and Innovation in Shaping Non-Compete Clauses

In the modern economy, startups and innovation have completely changed the nature of the non-compete clause. Historically, non-compete agreements have sought to guard against misappropriation of trade secrets by established businesses poised to take on new talent who might join competitors or start their own ventures. The latter ascendancy of startups- and, a little less indirectly, the culture of rapid innovation within them caused businesses, policymakers, and courts to rethink the breadth and enforceability of these clauses.It is critical that talent, mainly in innovation-driven industries, be allowed to move freely. Startups depend heavily on the mobility of highly qualified talent to bring new ideas and competitive expertise in their field. Non-compete contracts are often held unenforceable across many locations, especially in Silicon Valley, by state policies favoring employees' mobility over strict

[10] "Enforceability of Non-Compete Provisions During COVID-19 Pandemic" (*Perkins Coie*) https://perkinscoie.com/insights/article/enforceability-non-compete-provisions-during-covid-19-pandemic accessed March 2, 2025

[11] Garrison L-E Fitzgerald & Pirrotti, PC, "Non-Competes in the COVID-19 Era - Garrison, Levin-Epstein" (*Garrison, Levin-Epstein, Fitzgerald & Pirrotti, P.C.*, May 19, 2020) <https://garrisonlaw.com/non-competes-in-the-covid-19-era accessed March 2, 2025

[12] "The Impact of COVID-19 on Noncompete Agreements" (*Pappas Grubbs Price PC*, August 27, 2020) https://www.pappasgrubbs.com/publication/the-impact-of-covid-19-on-noncompete-agreements/ accessed March 2, 2025

enforcement of contractual restrictions[13]. The confluence has created an environment of fluid movement for workers as they change jobs or pursue the option of starting their own firms without legal encumbrances aimed at preserving corporate interests.

Most entrepreneurs thereby support more balanced approaches for protecting intellectual property. Instead of just broad-based non-compete clauses, new entities would like alternative mechanisms such as non-disclosure and non-solicitation agreements that will protect the company while fostering employee mobility[14]. By adopting narrower and specific contractual provisions, startups have been able to change the law. The overall direction this movement is taking is in line with the thinking that restrictive non-compete clauses would restrict innovation by hindering knowledge sharing and quelling the entrepreneurial spirit. Startups are rethinking their employment contracts. Most modern ventures draft a non-compete clause that is tailored narrowly to cover truly sensitive information, essentially leaving room for employees to use their skills elsewhere. That minimizes the chance for costly litigations while still working well with the agile and collaborative culture that is a hallmark of any innovative company. Therefore, startups are giving life to the scenario in which the protection of business interests and the desire to promote talent mobility are not oppositions.

In short, startups and innovations are of importance in setting up non-compete clauses. Under the push for flexibility and talent mobility, startups have been instrumental in rethinking traditional restrictions. Startups' permissions for lighter restrictions have made a dent in corporate policies and state regulations alike. This approach ensures that while the intellectual property is protected, the free flow of ideas, which are the lifeblood of innovation, is not unduly limited.

2.3 ALTERNATIVE LEGAL MECHANISMS FOR NCAs

Instead of relying on traditional non-compete agreements, alternative legal tools can give businesses the more specific options they need to safeguard their confidential and proprietary assets—like sensitive data and information, trade secrets, customer relationships, and intellectual property—without imposing expansive post-employment restrictions that stifle a

[13]Forum MSS, "MIT SMR Strategy Forum" (*MIT Sloan Management Review*)https://sloanreview.mit.edu/strategy-forum/will-a-noncompete-ban-impact-innovation-beyond-tech-hubs/ accessed March 2, 2025

[14] Legal C, "Non-Compete Clauses in Startups and SMEs" (*Corridalegal*, July 9, 2024) https://corridalegal.com/non-compete-clauses-in-startups-and-smes/ accessed March 2, 2025

person's mobility in their career and inhibit innovation in sectors like technology, finance, and biotechnology. For example, non-disclosure agreements (NDAs) require an employee to not disclose or use the employer's confidential information for a period of time, including many types and categories of information, from technical designs, algorithms, and data, to strategic business roadmaps; in the event of breach, the NDA calls for remedies like injunctive relief or liquidated damages; NDAs limit misuse of secret information and simply do not a limit an employee's ability to find future employment; thereby allowing talent to easily shift between organizations and still protecting the key corporate assets. Similarly, many businesses may utilize non-solicitation agreements to lay restrictions on their ex-employees from soliciting their customers or with soliciting key personnel at the previous employer for a limited time frame— often 6 months to two years—allowing employers both to protect customer goodwill, and to protect the team internally, all without over-restricting an employee's future ability to seek employment in their industry.

In many cases, garden leave provisions require departing employees to serve their notice period on paid leave from work. During that period, though they remain employed, employees have no access to operations. This scenario allows employers time to get a project transfer sorted out, secure sensitive or confidential information and protect client relationships while providing a paycheck for the employee over the notice period. Shortly preceding taking on a new role, leaving employees slot into a meaningful workplace transition sans consulting fees in a role they may or may not ever return to. Invention assignment agreements outline how any inventions, discoveries or expressive work that an employee creates while under their tenure will automatically be assigned to the employer. While also clearly laying out ownership of intellectual property to circumvent future disputes concerning "who owns what" as well as aligning the incentives for employees involved in the company's research and development. Many jurisdictions have statutory trade-secret protections that provide a standalone ground for action—civil and criminal—against a person or entity that misuses or misappropriates protected information. This type of protection is usually defined in statute relative to the creativity and novelty of the information, its commercial value, and the reasonable steps taken to ensure confidentiality, and grant injunctive remedies, damages (compensatory and punitive), and criminal sanctions. By integrating these alternative operating practices as part of an employment business model organizations can create a responsive, defensible and economically viable legal infrastructure that protects proprietary information while balancing the critical need for an inclusive fair labour market and activity that minimizes costs for

litigation, increases the expectation for compliance and enhances innovation which is especially important for many organizations in a knowledge economy.

3. COMPARATIVE ENFORCEABILITY: COMMON-LAW VS. CIVIL-LAW JURISDICTIONS

3.1 Common Law Jurisdiction

Non-compete clauses (NCCs) are often viewed as a controversial aspect of employment law, as they limit the employee's ability to engage in competing post-employment activities. Although common law jurisdictions derive their foundation from case law, they represent a stark contrast in the enforceability of NCCs. This country-specific analysis considers the legal systems in the U.S. and in India by discussing relevant doctrinal principles, judicial development, and socio-economic ramifications.

United States: State Variability and Judicial Pragmatism

In the United States, non-compete clauses (NCCs) are primarily regulated by state law, resulting in a patchwork of law characterized by case law and state statutory law. NCCs took root in the common law doctrine of restraint of trade, and courts in the U.S. evaluate NCCs using a "reasonableness" test to weigh employers' valid business interests against public policy considerations of employee mobility and industry-wide competition[15]. NCCs must normally be limited in duration, geographical area, and limited range of restricted activities, while protecting trade secrets, confidential information, or customer connections.

Differences at the state level are quite pronounced. Under California law, specifically Business and Professions Code § 16600, almost all non-competition covenants (NCCs) are unenforceable unless they relate to the sale of a business interest, as the state emphasizes promoting innovation, as well as employee mobility. This has been recognized as a policy that encourages an entrepreneurial environment in Silicon Valley. The California courts have stripped non-competition covenants in a line of cases, notably Edwards v. Arthur Andersen LLP[16] (2008), where the California state Supreme Court voided an NCC against an accountant, highlighting the state's lack of tolerance for NCCs. Other states, such as Texas and Florida, take

[15] Supra note 1
[16] 44 Cal. 4th 937

the opposite position, permitting NCCs when they are reasonable in scope. In Texas courts, for example, when a non-competition restriction is too broad, they apply the "blue pencil doctrine," which permits courts to strike out the overbroad language while leaving the enforceable language in the contract intact, as in Marsh USA Inc. v. Cook[17]). New York takes a middle ground, enforcing NCCs that are justified by a legitimate business purpose and do not cause undue hardship, see BDO Seidman v. Hirshberg[18] (permitting a one-year restriction on soliciting clients).

The recent federal initiatives, notably with the Federal Trade Commission's (FTC) proposed rule to ban NCCs nationally in 2023, indicate possible movement towards consistency. The FTC claims these NCCs depress wages, hinder innovation, and disproportionately negative impact on low-wage workers.[19] However, these broader actions have potential legal challenges, since critics assert that this is outside the FTC's authority and harms state rights. At the same time, Washington and Oregon have enacted "middle-ground" reforms, limiting NCCs to a duration of 12-18 months, and preventing them when the workers are low-income[20] .Regardless of these developments, the U.S. system continues to be criticized for its inconsistency. Employers face burdens of compliance across the multistate system, while employees in restrictive states, such as Alabama, face inequities in job opportunities. Scholars (Lobel, 2013) argue that the absence of federal coherence essentially creates inequities for workers, especially those who are marginalized. Still, the U.S. system can be viewed as embodying the common law tradition of adaptability, allowing courts to address the actions concerning the evolving labor market.

India: Statutory Constraints and Judicial Caution

India's restrictive stance toward non-compete clauses (NCCs) is evident in Section 27 of the Indian Contract Act, 1872, which makes agreements restricting trade "void."[21] This prohibition was arguably derived from colonial fears of monopolistic activity and has been mitigated by courts' exception for NCCs that protect trade secrets and confidential interests upon a very narrow reasonableness standard. The Supreme Court of India, in Niranjan Shankar Golikari v.

[17] 55 Tex. Sup. Ct. J. 184
[18] 690 N.Y.S.2d 854 (1999)
[19] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023)
[20] Orly Lobel, *Talent Wants to Be Free*, https://yalebooks.yale.edu/book/9780300166279/talent-wants-to-be-free/. accessed June 2, 2025
[21] Indian Contract Act, 1872, § 27

Century Spinning Co[22]. held that NCCs could only be enforced if they secured legitimate proprietary interests, a principle that was again reaffirmed in Gujarat Bottling Co. Ltd. v. Coca-Cola Co[23]. to apply for a two-year NCC for a bottling franchisee that had applied for a two-year NCC with a "very limited" scope.

In India v. Krishan Murgai[24] (1981), the Supreme Court struck down an NCC prohibiting an employee from joining any rival company, noting that Section 27 allows restraints only during the period of employment, not after the termination of employment. Similarly, in Percept D'Mark v. Zaheer Khan[25] (2006), a decade-long NCC on a celebrity endorser was struck down on the basis that its scope was overly broad, and the court emphasized the need for temporal and geographic proportionality. Sectoral trends show a degree of discrimination in enforcement: the Delhi High Court in Desiccant Rotors International v. Bappaditya Sarkar[26] struck down an NCC against a sales executive citing imbalance in bargaining power, while the Wipro Limited vs Beckman Coulter International S.A.[27] upheld an NCC restricting the IT employee, who handled financing for sensitive projects, for a period of 12 months.

Legislative reform is designed to reduce ambiguities. The 2023 Occupational Safety, Health and Working Conditions Code intends to limit the term of NCCs to six months, with compensation paid during the notice period guiding the prohibition from termination. Critics like Saini (2022) note the challenges with enforcing these provisions.[28] Meanwhile, the 2019 Model Standing Orders include recommendations on NCCs' attributions based on the industry in which they are applicable, and while these reforms are recognized as "forward thinking," there seems to be a lack of consistency from one state to another in their implementation[29]. India has a strong focus on employee rights, reflecting the socio-economic contexts of high levels of informality and power asymmetry. In many instances, courts are now willing to shout down NCCs, such as in the Quippo Infrastructure Equipment Ltd. v. Janardan Nirman Pvt. Ltd[30]. (2020) case involving a technician being forced to adhere to an NCC considered

[22] Supra note 6
[23] Supra note 7
[24] 1980 AIR 1717
[25] AIR 2006 SUPREME COURT 3426
[26] No.5453/2008 in CS(OS) No.337/2008
[27] 2006(2)CTLJ57(DEL)
[28] Debi S Saini, *Indian Industrial Relations Law: Case for Reform*, Indian Journal of Industrial Relations 117-132 (2014).
[29] Industrial employment (standing orders) central rules, 1946 (Ministry of Labor and EMPLOYMENT).
[30] AIRONLINE 2020 SC 494

exploitative. However, the absence of statutory criteria allows for more litigation, with employers often challenging court boundaries. In conclusion, India's NCC process displays a degree of rigidity in legislation and judicial reasonableness in practice, favoring equity over protecting employer interests. The legislative reforms are "positive," but as demonstrated by the examples analyzed in this working paper, they highlight a disorganized NCC process in need of coherent legislation that is consistent with labor market trends that are common in other parts of the world.

3.2 Civil-Law Jurisdictions

As NCCs are very valuable to the employer in protecting trade secrets and sustaining competitive advantages, the enforceability of such provisions varies widely from jurisdiction to jurisdiction. While the common law jurisdictions of the United States and India rely heavily on precedents as well as reasonableness tests, the civil law countries of Germany and France adopt a more codified approach with emphasis on the specificity of provisions and the protection of employees. This part deals with the enforcement of non-competition clauses in Germany and France and emphasizes how the rigid legislative framework shapes an equilibrium between the interests of the employer and the rights of the worker.

Germany: Statutory Precision and Proportionality

In Germany, non-compete clauses (NCCs) fall under the purview of §74 of the German Commercial Code (Handelsgesetzbuch, HGB) and §110 of the Industrial Code (Gewerbeordnung, GewO). These statutes impose strict terms in order to strike a proper balance of interests between employers and employees[31]. The statutory provisions, §74 HGB, provides that, to be enforceable, an NCC must specify (1) a duration of no more than two years following the employment, (2) a geographic scope limited to areas in which the employer conducts business, (3) protection of a legitimate business interest e.g. trade secrets or employee connection with customers, and (4) provide the employee compensation during the term of the NCC. For example, in 2020, the Federal Court of Justice (Bundesgerichtshof, BGH) struck down an NCC on appeal from a senior sales manager because the three-year duration was

[31] German Commercial Code (Handelsgesetzbuch, HGB) §74.

unreasonable under §74 HGB[32].

The 2020 amendment to the HGB introduced stronger transparency requirements, such that the NCCs must all be documented in the form of writing with phrases that clearly specify all details related to the scope, compensation, and duration of the NCC. The goal was to lower the incidence of disputes by ensuring that employees understand their obligations, consistent with the civil law principle of codified clarity embedded in German law. In contrast to the HGB, §110 GewO contains provisions that limit NCCs for apprentices, allowing for them only when the training warrants a restriction on employment. Some labor scholars have criticized this approach as an example of the power imbalance that exists in the vocational sectors of the economy.[33] Germany's statutory framework is characterized by an emphasis on proportionality.

Legislative changes mirror shifting labor priorities. The 2021 Works Council Modernization Act (Betriebsrätemodernisierungsgesetz)[34] enhances employee protections by mandating Works Council consultation before moving to an NCC, in the unionized context, thereby adhering to a norm of collective bargaining. Besides school of thought in academia indicates tensions within the German NCC regime. In a report from the OECD in 2021, the German "static" NCC regime was differentiated from more flexible non-codified systems in Nordic countries. Notably, the report highlighted increased compliance costs for German employers, which were attributed to the statutory language requiring compensation and duration rules. Competing labor advocates assert that the HGB provides a safeguard against employer abuse, especially in low-wage sectors where NCCs are unlikely due to the compensation requirements specified by law.[35]Overall, Germany's NCC framework demonstrates the underlying preference of civil law's focus on codified preventative measures rather than discretion by judicial officers. While the HGB provides proportionality principles for employee protections,

[32] BGH, Urteil vom 22.01.2020 – I ZR 139/18. Available at : https://www-lexsoft-de.translate.goog/cgi-bin/lexsoft/anwalt24premium.cgi?templateID=document&chosenIndex=UAN_nv_1057&xid=9501621&chosenIndex=UAN_nv_1057&_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc (last visited Mar 29, 2025)

[33] Gewerbeordnung [GewO] [Industrial Code], §110 (Ger.) available at https://www.gesetze-im-internet.de/gewo/__110.html (last visited May 25,2025)

[34] Frank Weberndörfer, *The new German Works Council Modernization Act*, Global Workplace Insider (Sept. 21, 2021), https://www.globalworkplaceinsider.com/2021/09/the-new-german-works-council-modernization-act/. (last visited May 25, 2025)

[35]Germany: Restrictive Covenants | Insights | Mayer Brown, https://www.mayerbrown.com/en/insights/publications/2024/07/restrictive-covenants-germany (last visited Mar 27, 2025).

the current debates around this topic argue for reforms providing flexibility to consider labor dynamics for workers' rights.

France: Rigid Codification and Employee Protections

France's treatment of NCCs is set out in the Labour Code Articles L. 1121-1 to L. 1121-3 and contains rigorous conditions that aim to constrain abuse.[36] For a NCC to be enforceable, it must (1) be necessary to protect the company's legitimate business interests (e.g., trade secrets, clientele); (2) of limited duration (often ≤ 12-24 months); (3) limited geographically to areas a worker performed under their contract; and (4) state compensation correlated to the restriction. In the Cour de Cassation, arrêt n° 00-41.132 (2002), the Supreme Court ruled that a 24-month NCC for a sales manager was invalidated because the 24 months exceeded "strictly necessary" under Article L. 1121-1.[37]The French courts are strict in the examination of reasonability. For example, the Cour de Cassation in Société Altitude c. M. X (2016) found that it was unreasonable to have an NCC for a regional salesperson who covered all of France, and instead confined the NCC to the salesperson's sales territory. Compensation for an NCC must be at least 30-60% of the employee's former salary, depending on the NCC scope. Besides, there are restrictions on NCCs for lower-paid employees (earning ≤1.5× the minimum wage) in Article L. 1121-2, as France seeks to ensure social equity[38].

The trend in legislation supports employee mobility. The 2016 El Khomri Law, or Loi Travail, increased penalties for non-compliant NCCs and obliged written justifications for their necessity[39]. In addition, in 2022, the Pacte Law legitimized a protocol for dispute resolution, requiring employers to establish the validity of the NCCs within 15 days of a termination.[40] However, some critics argue that rigidity in France undermines foreign investments. Indeed, a 2021 OECD report stated that 68% of multinationals found that the rules around NCCs in France were too restrictive compared to those in Germany. [41]Although criticisms exist of this

[36] French Labour Code, Arts. L. 1121-1 to L. 1121-3.
[37] Cour de Cassation, Soc., 11 juillet 2002, n° 00-41.132.
[38] French Labour Code, Art. L. 1121-2.
[39] *Loi n° 2016-1088 du 8 août 2016, Loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032983213 , (last visited May 25, 2025)
[40] *Loi n° 2022-217 du 21 février 2022 relative à la différenciation, la décentralisation, la déconcentration et portant diverses mesures de simplification de l'action publique locale* (France) (last visited May 26, 2025) . https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045197395, (last visited June 15, 2025) .
[41] OECD (2021), OECD Competition Trends 2021, OECD Publishing, Paris https://doi.org/10.1787/308565fd-en l(last visited June 12, 2025)

approach, it remains consistent with France's civil law view of codified protections for workers. Thus, France's approach to non-compete clauses (NCCs) prioritizes employee protection through strict legal conditions, ensuring fairness and limiting employer overreach. While this promotes worker mobility and social equity, critics argue that excessive rigidity discourages foreign investment. The evolving legal framework reflects France's commitment to balancing economic interests with labor rights.

4. CROSS-JURISDICTIONAL COMPARATIVE ANALYSIS

Non-compete clauses (NCCs) are contractual arrangements that limit the ability of employees to engage in competitive activities following separation from an employer. The enforceability and regulation of NCCs vary by jurisdiction and are influenced by legal doctrines, economic considerations, and labor protections. Common law jurisdictions - including the U.S. and India - follow a more flexible, case-by-case basis, while civil law jurisdictions - including Germany and France - follow a tougher statutory framework, often including minimum compensation provisions and required proportionality assessments. The following analysis identifies the differences and their impacts on the employer and employee.

4.1 Legal Foundations and Enforcement Criteria

A comparative overview given below showcases the differences among various jurisdictions in the regulation of the NCC based on a legal basis, enforceability standards, judicial discretion, public policy interests, compensation standards, and protections for low-wage workers.

Criteria	Common Law (US/India)	Civil Law (Germany/France)
Legal Basis	Judicial precedent and state statutes (US); statutory prohibition with judicial exceptions (India).	Codified statutes with strict proportionality (Germany); rigid legislative frameworks (France).
Enforceability Standard	"Reasonableness" test (scope, duration, geography) and legitimate business interest.	Statutory thresholds (e.g., maximum duration, compensation mandates).

Judicial Flexibility	High (e.g., blue-pencil doctrine in the US); moderate in India due to statutory constraints.	Low; courts strictly interpret codified rules (e.g., Germany's §74 HGB, France's Labour Code).
Public Policy Focus	Balancing innovation and competition (US); equity and preventing exploitation (India).	Employee welfare and social equity (France); proportionality and employer compliance (Germany).
Compensation Requirements	Rarely mandated (US); emerging in India's 2023 Labour Code.	Mandatory (≥50% of salary in Germany; 30–60% in France).
Low-Wage Worker Protections	Limited (state-specific in the US); judicial voiding in India.	Statutory prohibitions (France: ≤1.5× minimum wage); rare in practice (Germany).

The table demonstrates the difference between common law systems, which allow for judicial discretion and hold case-specific rulings, and civil law systems, which impose predetermined statutory conditions. In Germany and France, the obligatory compensation would offer employees greater financial security, while the U.S. and India policies offer employers more regulation for enforcement. The level of judicial discretion and public policy will also affect the degree to which NCCs are enforced or limited in the various jurisdictions.

4.2 Divergent Legal Traditions

Common Law Flexibility vs. Civil Law Rigidity

- **United States:** Judicial pragmatism allows for divergence among state courts. Courts in intermediary states prioritize employer interests in innovation hubs (e.g., Texas) while keeping the NCC in effect in worker-friendly states (e.g., California). The FTC's proposed nationwide

ban (2023) highlights the federal-state tensions.[42]

- **India:** With the legal basis in Section 27 of the Indian Contract Act of 1872, India's default position is to void Non-Compete Contracts ('NCCs'), with an exception for trade secrets developed through judicial interpretation[43]. Recent reforms, which are attempting to regularize enforcement through a six-month limit in the 2023 Labour Code, are still ambiguous, specifically in lower wage industries in which courts frequently void NCCs for unequal bargaining power[44].

- **Germany:** §74 HGB mandates strict proportionality, compensation, and geographic specificity. The 2021 Works Council Act reinforces collective bargaining but burdens SMEs[45]

- **France:** In France, Article L. 1121-1–3 of the Labour Code governs the rule regarding NCC prioritizing employee mobility, with strict duration caps (≤24 months) and compensation rules[46].

Thus, the distinction in philosophy is clear: common law systems value a degree of flexibility, constantly for courts to take the 'reasonableness' of the employer action into account, as the employment relationship adjusts to an ever-evolving labor market. In contrast, civil law systems insist on statutory certainty, and their reluctance toward flexibility helps to limit employers from asserting unfair power through overly broad policy. The U.S. and India have to wrestle with a combination of unstable and inconsistent enforcement of the law by state and federal law and courts, while Germany and France have to balance codified protections against the mobility of workers demanded by globalization. In all five of these traditions in labor law, we can observe a larger tensions in labor law as applied to employment in general: flexibility and mobility versus predictability, with each tradition helping to teach the other about the balance rates of flexibility in statutory of common law against the protection of stability provided by civil law.

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[42] Federal Trade Commission, 'Non-Compete Clause Rule' (Proposed Rule, 19 January 2023) 88 Fed Reg 3482 https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule (last visited June 12, 2025)

[43] Indian Contract Act, 1872, § 27; *Gujarat Bottling Co. Ltd. v. Coca-Cola Co.*, (1995) 5 SCC 545.

[44] Saini DS, "Indian Industrial Relations Law: Case for Reform" (January 1, 2014) < https://www.researchgate.net/publication/265596898_Indian_Industrial_Relations_Law_Case_for_Reform > (last visited June 15, 2025)

[45] Supra note 32

[46] Supra note 36

5. POLICY IMPLICATIONS AND RECOMMENDATIONS

5.1 Policy Implications

- **Legal Certainty versus Judicial Discretion**

India has a considerable dependence on a statutory prohibition, almost a blanket prohibition, it can add exceptions by the judiciary (e.g, Niranjan Shankar Golikari; Gujarat Bottling Co.) which leading to uncertain outcomes along with longer litigation. Other jurisdictions (Germany, France) establish statutory law rules for exceptions that clearly quantify criteria (length of time, geographic reach, and compensation), thereby eliminating uncertainty and reducing transaction costs.

- **Economic Growth and Innovation**

Excessively broad non-compete clauses inhibit entrepreneurship and talent mobility, especially in knowledge-based industries such as IT, pharmaceuticals, and startups. The shift toward remote work makes geographic restrictions even more difficult, and makes many covenants incapable of enforcement, or at best unfair

- **Social Equity and Labour Rights**

Consideration must also be given to how the differential impacts of restrictive covenants affect lower-income and informal sector workers. The U.S. has seen heightened scrutiny of non-competes for low-wage workers, leading some states to ban them or strike them down entirely. Given India's high levels of informality and existing power asymmetries, calculated impact waivers need to be offered so that exploitative bargaining does not take place.

- **Additional Protective Avenues**

Non-disclosure agreements (NDAs), non-solicitation provisions, garden-leave agreements, and invention-assignment agreements provide more fine-grained protection of proprietary interests without unduly limiting post-employment mobility. The more widespread use of these solutions could lessen the reliance on blunt, broadly worded non-competes.

5.2 Recommendations

- **Enact a Statutory Framework with Clear & distinctive Parameters**

To provide clarity and certainty, India should pass a new law that sets out enforceability criteria for post-employment restraints. It would set non-compete durations at six to twelve months, geographic reach would be explicitly related to an employer's operational reach, and required compensation would be at least thirty to fifty percent of an employee's last salary during the restraint period. If these parameters were codified in law, courts would be able to disregard unreasonable restrictions while enforcing ones that are truly reasonable. With greater statutory clarity on non-compete obligations, litigation would be cheaper and more efficient, frivolous actions would be scaled back, and non-compete clauses would remain proportional to an employer's legitimate interest instead of being the methodology through which the employer-maintained control over the mobility of its employee pool.

- **Promote Alternative Protective Avenues**

Employers can make use of protective covenants —perhaps most commonly non-disclosure agreements, or NDAs, that restrict unauthorized disclosures or use of confidential proprietary information for a specific period of time; non-solicitation clauses or provisions that restrict former employees from soliciting certain current or former clients or key personnel for a period of time between six and twelve months; and invention-assignment provisions that clarify ownership of intellectual property (IP) created during employment. In addition, legislators could enable the use of model templates for nondisclosure agreements and non-solicitation clauses for specific sectors, such as information technology, pharmaceuticals, and finance. These types of specific protective covenants target specific business concerns while allowing employee mobility and fluidity in employment.

- **Capacity building and strict judicial guidelines**

India's judiciary should create a complete set of instructions with criteria for assessing reasonableness in the scope, duration, and geography of restrictive covenants, so that restrictive covenants can be consistently adjudicated. These instructions should endorse the blue-pencil doctrine, allow courts to strike out unenforceable provisions but keep enforceable covenants, and dismiss the unreasonable restrictive covenant as a whole. Judicial academies and bar

councils should host targeted training workshops and continuing education programs for judges, arbitrators, and lawyers on comparative jurisprudence, sectoral specifics, and evidence on non-compete impacts. This will not only develop capacity but also provide more certainty in evaluations, help forum shopping, and reduce injunctions, where there are no bona fide business interests.

- **Require Periodic Reporting and Data Collection**

India should require periodic reporting and independent assessment of the effects of restrictive covenants. Employers should need to provide a summary (yearly) of the number of employees with non-compete and related covenants, the average term of the covenants, average compensation levels, and the range of outcomes in cases involving employees with non-compete covenants. Government agencies, or a public body of academic researchers, would assess these data and provide an annual public report, called the "Labour Mobility and Innovation Index," that summarizes empirical data over time that would point to trends on wages, the number of start-ups, and the frequency of litigation. Again, using this information, policymakers can adjust the statutory parameters based on evidence of impact. This recommendation aims to develop new means to collect data and provide transparency to government and workplaces to enable evidence-based reforms that interact positively with the protection of business, an agile workforce, and economic growth.

6. Conclusion

This research has tracked the journey of non-compete clauses in India—from the colonial common-law roots under Section 27 of the Indian Contract Act through the Supreme Court's strict construction after independence, exploring its developments as we entered periods of economic liberalization and the digital age. India's absolute prohibition of post-employment restraints (aside from narrow goodwill exceptions) shows a strong public-policy preference for flexibility in labor movement and free trade. However, when compared to both common-law (U.S.) and civil-law (Germany, France) jurisdictions, the presence of clear statutory minimums—fixed duration, geographic limits, and some form of compensation—can add legal certainty and help to ensure a reasonable balance between protecting legitimate business interests. From these perspectives, the paper's policy recommendations call for a custom-made Indian statute that stipulates enforceability conditions, encourages alternative covenants (NDA's, non-solicitation), and creates specialized tribunals and empirical monitoring to ensure

proportionality and transparency. This reform can lead to lowering litigant expenses, deterring overbroad restraints, and aligning India's framework with global regulatory standards without detracting from employee rights and the promotion of innovation.

Moving forward, future research should empirically study the effects of restrictive covenant enforcement and associated wage growth, growth in start-up formation, and firm competitiveness in India's maturing gig and remote-work economies. Furthermore, longitudinal studies that compare outcomes before and after reform would provide meaningful feedback loops for policy revisions. In our comparison of India's trajectory in the larger global context, we found that a carefully calibrated, evidence-based approach can balance the protection of business with occupations that are dynamic in their workforce, thereby encouraging a path for both economic performance and fairness.